stantiate the above doctrine, but no cases are cited in which the dismissal of the proceedings was due to technical statutory reasons, as in the case at bar. This very question arose in the case of *Sears v. Hathaway,* 12 Cal. 277. The defendant had caused the plaintiff to be arrested on the charge of concealing property with intent to defraud and delay creditors. The statute provided that in such cases the fraud must be evidenced by writing and in the absence of such evidence the accused was acquitted. The court in its decision said: "A party who stands before a jury in such a case as this on pure technical law, for a defense against an act of moral turpitude, and claiming a discharge because his prosecutor has not pursued a statutory mode of proof to convict him of a crime punishable by the statute, may congratulate himself that the precautions of the law have availed him to escape its merited penalty; but he certainly ought not to have in addition to this immunity, a right to claim a small fortune from his victim for having mistaken the remedy, or not having been as well versed as himself in technicalities which sometimes shield guilt from public justice." Here we have an action which was terminated by a jury's verdict of not guilty. Still the court held that it was not such a termination as would support a suit for malicious prosecution except perhaps to the extent of the amount actually expended by the accused in defending the action.

Another question presented was whether or not the mere issuance of a warrant on a criminal charge constitutes such a prosecution as will give rise to a right of action in the party claimed to have been injured. The courts of the several states are in conflict on this question. The New York court, in sustaining this right, has adopted the rule which is probably supported by the weight of authority and which as the court says should be adopted "if for no other reason than to satisfy the principle of law which demands an adequate remedy for every legal wrong." However, the court was divided on this question, and Justice Vann filed a strong dissenting opinion. All the justices concurred in the result.

WHEN FEDERAL COURTS MAY ENJOIN STATE TRIBUNALS.

In sustaining the action of the Circuit Court, the Supreme Court of the United States placed a new interpretation upon the Act of Congress which protects state courts that have acquired

jurisdiction from interference by the Federal judiciary. In *Prentiss v. Atlantic Coast Line*, 211 U. S. 67, the court holds that this immunity is not absolute and at all events, but that it applies only to proceedings in which the state court is acting as a court,—in other words, that it is the character of the proceedings and not the character of the tribunal, that determines the immunity. The statute in question, Rev. Stat., Sect. 720, is as follows: "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any courts of a state, except where such injunction may be authorized by any proceedings in bankruptcy."

This case arose from the fixing of passenger rates to be charged by the various steam railroads within the state of Virginia. The corporation commission gave notice by publication to all parties interested to show cause why certain maximum rates should not be adopted. The railroad companies appeared and a hearing was had under all the rules of procedure governing a judicial inquiry, and after the roads had announced that they had no more testimony to offer, the commission took the whole matter under consideration and after a delay of several months announced its findings in which it declared that certain named rates would thereafter be in force, and further that these rates had been found just, reasonable and not confiscatory. Before the order could be published, the railroads went into the Circuit Court of the United States and applied for an injunction on the ground that the rates proposed to be enforced deprived them of property without adequate compensation. An injunction *pendente lite* being granted, the commission entered its special appearance in which it objected to the jurisdiction of the court, demurred on the ground that it was protected by the statute above mentioned, and further entered a plea of *res judicata,* on the theory that these rates had been judicially investigated by the commission, which was a court of competent jurisdiction, and found just, reasonable and not confiscatory. All of their defenses being overruled they declined to answer further and the bills were taken *pro confesso* and a perpetual injunction entered. The matter was then appealed to the Supreme Court of the United States.

In sustaining the grant of the injunction, the Supreme Court points out the distinctions that separate the various functions of this Commission. In arriving at a proper understanding of the powers of this Commission they adopt the interpretation placed by the Supreme Court of Appeals of that state upon the sections

of the Constitution of Virginia which created it. In *Norfolk v. Commonwealth,* 103 Va. 295, that court said: "In this commonwealth the State Corporate Commission is the instrumentality through which the state exercises its governmental powers for the regulation and control of public service companies. For that purpose it has been clothed with legislative, executive and judicial powers."

It will be seen from this that the Commission has the powers of the court, and in addition thereto, the powers usually delegated to the other two branches of government. While this is unusual, it has been held constitutional, and is not without precedent. The separation of the three great departments of government is obligatory upon the nation and not the individual states. *Dreyer v. Illinois,* 187 U. S. 71. In *Calder v. Bull,* 3 Dallas 386, the Supreme Court of the United States had before it a case in which the legislature of Connecticut had granted a new trial in a private litigation. It was claimed that this was an invasion of the powers of the judiciary. This was not denied, and the court held that this did not violate any provision of the Constitution of Connecticut and that there was not any federal question involved. There are numerous other instances in the reports where one department of a state has exercised functions of another department.

Admitting that the commission is to some extent a court and that the uniting of powers is constitutional, the next inquiry must be as to the character of the proceedings brought into question. It was the determination and publication of certain railroad rates, and the making of rates is a legislative function. The Supreme Court so held as far back as 1876, *Munn v. Illinois,* 94 U. S. 133; *Chicago etc., Railway Co. v. Iowa,* 94 U. S. 153; and these cases were reviewed and sustained in the famous case of *Smythe v. Ames,* 66 U. S. 466. This settles the question that in prescribing what rates are to be in force, the state, through its commission, was exercising its legislative and not its judicial function.

But even admitting that rate-making is absolutely a legislative function, the Commission contended that a full and complete hearing had been held, in which the railroads had been fully represented and heard, and that in finding that the proposed schedule of rates was just, reasonable, and not confiscatory, the Commission had acted judicially, that there had been due process of law, that the matter was therefore *res judicata,* and the pro-

ceedings in question those of a court such as is protected by the statute under discussion, and in this contention they are sustained by the Chief Justice with whom Justice Harlan concurred. The majority of the court holds that in making the order enjoined, the commission was exercising its legislative functions, and before the matter could become *res judicata,* and attain the dignity and protection of a judicial inquiry, there must first be a valid law, a failure to obey it, and then an inquiry as to whether or not the law had been violated or was constitutional. They rest their conclusion in part upon the decision of the courts of Virginia in *Winchester Railway Co. v. Commonwealth,* 106 Va. 281, a portion of that opinion being the following: "When in the exercise of its legislative function it (the Commission) has in obedience to the laws of the state summoned persons, natural or artificial, before it, to protect their rights, it has done what is not required to be done by the Fourteenth Amendment to the Constitution of the United States, and what it might have omitted to do, so far as that instrument is concerned. But when it comes to enforce its rules and regulations, this right to be summoned to answer is not satisfied by the antecedent summons and appearance before the commission. The Commission may exercise legislative and judicial functions but cannot confuse and blend them in one proceeding."

Pursuing further this line of reasoning the court holds that the final act accomplished determines the nature of the entire proceeding, and in this case the final act was legislative. The previous hearing, while termed by the Chief Justice as a judicial inquiry preceding legislative action, is held by the majority of the court to be only that investigation which to some extent should precede all legislation. It holds that legislation and adjudication cannot be part of one and the same proceeding, and further, that by no process of reasoning can a judicial inquiry take place and litigation result before the law is put into effect. "A judicial inquiry investigates, declares and enforces liabilities, as they stand on present and past facts, under laws supposed already to exist. Legislation on the other hand looks to the future, and changes existing conditions by making a new rule to be applied thereafter. * * * * The establishment of a rate is the making of a rule for the future, and therefore is an act legislative and not judicial in kind. See *Interstate Commerce Com. v. Cincinnati etc., Railway,* 167 U. S. 479 to 505.

Furthermore, it has already been held, in a case involving the North Carolina Railroad Commission, that proceedings legislative in nature are not proceedings in a court within the meaning of Rev. Stat. 720, no matter what may be the general or dominant character of the body. *Southern Ry. Co. v. Greensboro Ice & Coal Co.*, 134 Fed. Rep. 82, affirmed, 202 U. S. 543. Had this been a proceeding to enforce an order of the commission already promulgated, it could not have been interfered with by injunction, but "litigation cannot arise until the moment of legislation is past." See *Southern Railway Co. v. Com.*, 107 Va. 771; 60 S. E. 70.

MENTAL ANGUISH AS DAMAGE IN DELAYED TELEGRAMS.

There have been many conflicts in decisions between the different state courts but it is doubtful whether there is any subject upon which the cases are so positively opposed to each other as that mentioned above.

The Supreme Court of Tennessee in *Western Union Telegraph Co. v. Potts*, 113 S. W. 789, is the most recent case to hold that mental anguish is an element of damage recoverable for delay in delivering a telegram announcing a death. When Shearn and Redfield published their work on the *Law of Negligence*, they expressed the opinion that delay in the announcement of a death may often be productive of an injury to feelings which cannot easily be estimated in money, but for which a jury should be at liberty to award fair damages. No authorities were cited to support the proposition and it passed unnoticed until the case of *So Relle v. W. U. Telegraph Co.*, 55 Tex. 308 (1881). In this case the court adopted the suggestion of Shearn and Redfield, and for the first time in the history of the common law, damages were awarded for mental suffering caused by the delay of a telegram. The opinion said that the natural consequence of a failure to transmit and deliver a so-called death message was to produce the keenest sense of grief and inflict upon the mind the sorest sorrow for which justice required the balm of damages. Hitherto, no jurisdiction allowed a recovery for injury to feelings except in a few isolated breach of promise suits, or in cases where the injury was wilful and malicious. But this case has been the precursor of a number of others holding the same way and may be considered responsible for the great division of opinion now existing. At the time the decision was rendered it is doubtful